IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 457 OF 2003

IN

SUMM.SUIT NO.2140 OF 2002

M/s Mustan T.Kagalwala .. Plaintiff

versus

M/s Cosmos Publicity & Display & ors.Defendants

...

Mr. P.B.Kapadia for Plaintiff.

CORAM : D.G. KARNIK, J

DATED : 28th March 2005.

P.C:-

1. Heard learned counsel for the plaintiff. None present for the defendants. The plaintiff has filed on record the affidavit of service of the writ of summons on the defendant nos.1,3 and 5. Office report dated 7th March, 2004 also states that the summons has been served on the defendant nos. 1,3 and 5. Defendant nos. 1,3 and 5 have not filed their appearances.

2. The plaintiff has filed on record the affidavit of service of the Summons for Judgment on the defendant

nos. 2 and 4. Despite service, the defendant nos. 2 and 4 have not filed an application for leave to defend nor filed any affidavit in reply.

3. The plaintiff through its counsel tenders the original documents. The documents are taken on record and collectively marked X.

4. I have perused the plaint and the documents produced on record. For valuable consideration the defendant no.1 drew a bill of exchange of Rs.1,00,000/- on the defendant no.2 on 1st August, 1999. The defendant no.2 accepted the bill by signing the bill. The defendant nos. 1 and 2 however failed and neglected to make the payment on the due date. The plaintiff therefore by advocate’s notice dated 7th May, 2002 demanded the payment. Thedefendant nos. 1 and 2 however failed and neglected to make the payment. In the absence of appearance of defendant no.1, the plaintiff is entitled to a decree against the defendant no. 1 under order 37 Rule 3 (6) of the Code of Civil Procedure. In the absence of affidavit in reply the averments made in the plaint are deemed to be admitted and the plaintiff is entitled to a decree against the defendant no.2 who is the acceptor

of the bill of exchange.

5. The plaintiff also seeks a decree against the defendant nos. 3 to 5 in the capacity of partner of defendant no.1. In the title of the plaint, it is averred " Defendant no.1 being a partnership firm and defendant nos. 3 to 5 being partners....." In the body of the plaint, the plaintiff has nowhere averred that defendant nos 3 to 5 are partners of the defendant no.1. Title to the plaint does not form part of the pleadings. In the absence of any pleadings that defendant nos. 3 to 5 are partners no decree can be passed against the defendant nos. 3 to 5. Hence, Summons for Judgment is made absolute against defendant no.2 and suit is decreed ex parte against the defendant nos. 1 as follows:

> " The defendant nos. 1 and 2 shall pay to the plaintiff a sum of Rs.1,45,000/- together with interest at 9 % p.a. from the date of the suit till payment and all costs of the suit. Suit against defendant nos.3 to 5 is dismissed."

D.G.KARNIK, J